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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 625

HAROLD JOSEPH O'CONNELL, EVAN WILLIAM AARON, EMANUEL ALEXANDER BEACH, AND CLEVELAND WALTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 727–730) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered January 26, 1948 (R. 731). The petition for a writ of certiorari was filed February 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether 18 U. S. C. 409, providing for the punishment of "whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any * * * dining car * * * any money," applies to employees on a railroad dining car who, by means of a fraudulent scheme whereby they turned in to their employer fewer meal checks than the number of meals they served, appropriated moneys received from passenger guests in payment for meals.

2. Whether the evidence sufficiently established a single conspiracy as charged.

STATUTE INVOLVED

Section 1 of the Act of February 13, 1913, c. 50, 37 Stat. 670, as amended by the Act of January 21, 1933, c. 16, 47 Stat. 773 (18 U. S. C. 409), provided in pertinent part, during the period of the alleged conspiracy (June–September, 1945)[1] as follows:

> * * * whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, or from any passenger or from the possession of any passenger while on or in such passenger

[1] This section was again amended by the Act of July 24, 1946, c. 606, 60 Stat. 656. See p. 7, *infra*.

> car, sleeping car, or dining car, when such car is a part of a train moving [in interstate commerce], any money, baggage, goods, or chattels * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

An indictment (R. 1b–1i) filed in the District Court for the Southern District of New York charged petitioners and six other defendants with conspiracy to violate 18 U. S. C. 409 by stealing and unlawfully taking money, by fraudulent devices and schemes, from dining cars of the New York Central Railroad Company while such cars were parts of trains moving in interstate commerce. Petitioners were found guilty following a jury trial (R. 691).[2] O'Connell was sentenced to imprisonment for one year and a day and to pay a fine of $1,000 (R. 713), Aaron to imprisonment for six months and to pay a fine of $200 (R. 715), and Beach and Walton to imprisonment for six months and to pay a fine of $300 each (R. 719, 717). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 731).

The evidence adduced by the Government may be summarized as follows:

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[2] Severances were granted as to two of petitioners' co-defendants (R. 23), and the other four entered pleas of guilty (R. 20–21, 459).

Petitioner O'Connell was the steward assigned to the dining car of a New York Central Railroad train which made regular round-trip runs between New York City and St. Louis, Missouri (R. 49–52). The other petitioners and three of the defendants who pleaded guilty were the waiters on the same dining car (R. 52, 152). The fourth defendant who pleaded guilty was the chef (R. 52, 459).

The procedure set up by the railroad for its dining cars was this: When a passenger entered the dining car to be served, he was seated and presented with a menu, a check, and a pencil. The passenger wrote his order on the check, which was then picked up by the waiter assigned to his table. The waiter read the order back to the passenger, leaving the original of the check on the table, and presenting a duplicate, or carbon copy, to the chef, who filled the order. When the passenger finished his meal, the waiter presented the original of the check to the steward to have the cost of the meal recorded on it, and the waiter then presented it to the passenger for payment. The waiter gave the check and the money to the steward, who placed them in his cash drawer. The steward later turned in the original checks, and the chef the duplicates, to a company office. (R. 62–64.) Passengers were not permitted to give their orders orally. If a passenger was unable, or refused, to write out his

order, the waiter notified the steward, who wrote the guest's order for him. (R. 65.)

Evidence was adduced that in numerous instances petitioners Aaron, Beach, and Walton, and the other waiters assigned to petitioner O'Connell's dining car, took oral orders from passengers, orally advised them of the amount due, and collected the money without the presentation of any check whatever. Sometimes the waiters would pretend to write passengers' orders on checks and later orally inform them of the amounts due, without presenting the checks to them. Sometimes previously used checks would be presented. Occasionally a blank check would be laid on the table by the steward, O'Connell, when the passenger was first seated, and either the steward or the waiter would then pick up the check before the passenger had a chance to write his order, which would then be taken orally. (R. 310–325, 346–356, 375–386, 400–413, 473–486, 511–517, 526–536, 547–554.)

Ralph Nolan, an F. B. I. agent, testified that, posing as a student steward, he was assigned to work under petitioner O'Connell and made two round trips with him in that capacity (R. 120–121, 170f). When he first met O'Connell, the latter told him that "there was big money to be made on the job," that "a new man should work along and keep his nose clean," and that, though "when he started to work nobody told him anything," he

"was doing all right now" (R. 124). On numerous occasions, while meals were being served, O'Connell told Nolan to leave the dining car and "take a rest in the men's lounge"; Nolan did as instructed at first, but later told O'Connell that he "needed the experience" and so was allowed to remain throughout the meal periods (R. 132, 140, 146, 153, 158, 165). In addition to testifying to numerous violations of company regulations, of the types previously indicated, on the part of the waiters and O'Connell (see, e. g., R. 129–130, 133–150, 155–157), Nolan testified that on three occasions he was instructed by O'Connell to "abstract" the meal checks following a meal period, this process consisting of counting the number of persons served according to the checks and totaling the cash receipts; in each instance the number of checks was substantially less than the number of persons who had actually been served according to Nolan's observations (R. 153–154, 158, 170a–170b). Nolan also testified that on one occasion, after one of the waiters had given O'Connell $3 which he had received from two passenger guests, O'Connell placed the money in his cash drawer and then immediately withdrew $1 and gave it to the waiter (R. 129–130). On another occasion, after a guest had finished an orally ordered meal, O'Connell "paged through" some used checks and "selected one," which he presented to the guest; when the guest paid the waiter who had served him, the waiter gave O'Connell the check with a

$1 bill, saying that he "still owed [O'Connell] 70 cents," and "reached in his pocket and took some small change out and gave it to O'Connell" (R. 139; see also R. 169). On yet another occasion, Nolan observed a waiter take an oral order from one guest and a written order from another guest at the same table; the waiter later collected $1 from each of the guests, and turned the money over to O'Connell together with the single check, saying that "One was on and one was off" (R. 157). On numerous occasions, after a waiter had delivered to O'Connell money which he had collected on an oral order, Nolan noticed that the waiter "would go into the kitchen" and that O'Connell "would follow him" (R. 170m–170p).

ARGUMENT

1. Petitioners contend that as originally enacted the substantive statute applied only to thefts of interstate shipments and baggage (18 U. S. C. 409); that the committee reports and pertinent debate on the amendment here involved (January 21, 1933, *supra*, pp. 2–3) disclosed that that amendment was designed only to protect the property of passengers and not to cover embezzlement; and that it was not until the statute was amended on July 24, 1946 (c. 406, 60 Stat. 656), subsequent to the conspiracy charged, that the crime of embezzlement was added to the offenses penalized by the statute (Pet. 9–17).

There can be no doubt, as is indicated by the legislative materials to which petitioners refer

(Pet. 11–13), that the 1946 amendment was regarded as importing the new crime of embezzlement into the statute, but to us it seems clear that on its very face the statute prior to the amendment of 1946 encompassed embezzlement.

While it cannot be denied, as is disclosed by the legislative data cited by petitioners (Pet. 9–10), that the amendment of 1933, the one here in controversy, was aimed primarily at offenses involving the property of passengers, the language which Congress employed was not so limited. In addition to thefts from or the defrauding of passengers of their money, baggage, goods, or chattels in their possession, the 1933 amendment penalizes "whoever shall steal or shall unlawfully take by any fraudulent device, scheme, or game, from any passenger car, sleeping car, or dining car, * * * any money, baggage, goods, or chattels" (*supra,* pp. 2–3). This language is obviously not confined to thefts or takings of property of passengers from dining, passenger, and sleeping cars. It involves thefts or takings of money or other property from anyone so long, of course, as it is taken from a passenger, sleeping, or dining car, rather than, for example, a baggage car. There is no qualifying language limiting the "money, baggage, goods, or chattels" to that of passengers. The property of the railroad or of its employees clearly cannot be excluded under the language employed. Nor is there any basis for the view that under the

language utilized the statute should be construed to include the theft by a waiter of silverware from the dining car but to exclude the embezzlement by the waiter of money collected from a passenger for a meal. The amendment involves not only "stealing" but also "unlawful taking" by "any fraudulent device" or "scheme". Language of this character clearly goes beyond common law larceny,[3] and involves any unlawful taking of which fraud is an element. Embezzlement certainly constitutes "unlawful taking" and fraud is the very essence of embezzlement, involving as it does the abuse of the confidential relationship existing between the appropriator and the owner of the property appropriated. Miller, *Criminal Law*, p. 379. In *Stone* v. *United States*, 153 F. 2d 331 (C. C. A. 9), the statutory provision in question was applied without controversy to a conspiracy prosecution involving facts substantially similar.

2. Petitioners also contend (Pet. 17–22) that the Government established, not one conspiracy, as charged, but six conspiracies, each involving the steward, the chef, and one of the six waiters. They argue that each waiter dealt only with the steward and the chef, and not with any of the

[3] Cf. *United States* v. *De Normand*, 149 F. 2d 622, 624 (C. C. A. 2), certiorari denied, 326 U. S. 756, and *United States* v. *Handler*, 142 F. 2d 351 (C. C. A. 2), certiorari denied, 323 U. S. 741, and the statutory provisions there considered.

other waiters. They thus seek to equate the facts in this case to those in *Kotteakos* v. *United States*, 328 U. S. 750, where a number of separate conspiracies, each having a common figure, were prosecuted as a single conspiracy. The contention is without merit.

The facts in this case are clearly different, and substantially so, from those of the *Kotteakos* case. There, Brown, the common figure in the multiple conspiracies, acted as broker for numerous persons in the fraudulent procurement of loans under the National Housing Act. No connection whatever was established among any of Brown's principals. Here, on the other hand, the steward, the chef, and the six waiters all formed a tight little group engaged in serving meals to passengers in a single railroad dining car. All, obviously, knew one another, and were in daily contact with each other. It was, therefore, beyond the realm of reasonable possibility that each waiter did not perceive that the other waiters were engaging in the same sort of fraudulent transactions with the steward and chef that he himself was engaging in. Under the circumstances, the jury were plainly justified in believing that each waiter knew that his arrangement with the steward and chef was part of a larger scheme, to which his fellow waiters were parties, and that he knowingly consented to playing his role in the larger plan. A single conspiracy was, therefore, made out. See

Blumenthal v. *United States*, 332 U. S. 539, 553–559.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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